Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY OF COMMENTS

The Commission recognized in the Further Notice of Proposed Rulemaking (*FNPRM*) that there are substantial problems with current intercarrier compensation regimes, under which traffic is treated differently depending on the identities of the carriers, the jurisdiction of the call, and the underlying technology of the network on which the call originated. There is also considerable agreement in the record on many of the core elements of the ultimate solution to those problems. The task before the Commission is to select an appropriate path to transition the industry from the complicated, regulation-driven markets of today to the competitive, consumer-driven markets of the future.

Three fundamental principles underlie the position of the United States Telecom Association (USTA) on intercarrier compensation reform: (1) companies investing in and operating telecommunications networks need to have meaningful opportunities to be fully compensated for the value of their networks; (2) the ubiquitous reach of our nation's telecommunications infrastructure and the universal availability of high quality, affordable telecommunications services are great achievements that strongly contribute to the health of the American economy, so they must be preserved and advanced; and (3) market-based competition generally produces outcomes superior to those produced by regulatory fiat and, therefore, the Commission should allow the competitive process to govern market outcomes wherever possible.

USTA's Five Core Recommendations. To help the Commission choose an ultimate solution, USTA has five core recommendations for the Commission:

1. minimize regulatory arbitrage with a default intercarrier rate structure that treats traffic uniformly;

2. integrate universal service reform with intercarrier compensation reform, paying particular attention in both cases to the unique needs of rural, insular, and 2% service providers;
3. rely in the first instance on competition and commercial agreements where possible to determine market outcomes;
4. ensure that the restructuring of intercarrier compensation should not itself cause additional reductions in net revenue to make certain that LECs are compensated for the use of their networks; and
5. facilitate indirect interconnection by ensuring that transit service is available for voice traffic.

If the Commission follows these recommendations, it can reform successfully the existing intercarrier compensation regime.

There is broad agreement among the plans on the salient points. USTA has carefully reviewed each of the proposals parties have submitted in the record, and it is struck by the large degree of agreement on major issues. While there are few points where all proposals are in agreement, there is broad agreement among many of the proposals on the following seven key issues: (1) there should be a uniform rate structure that treats functionally-equivalent traffic the same without regard to jurisdiction, service, or technology; (2) reform may require modest, equitable increases in end-user rates; (3) an Access Recovery Mechanism (ARM) should be created in addition to end user rate increases, and it should be administered so as to give local exchange carriers (LECs) the opportunity to recover revenue reductions in interstate and intrastate access charges; (4) the Commission should preempt state commission jurisdiction over intrastate access charges to the extent necessary to unify the rules for intercarrier compensation; (5) there should not be any sudden or dramatic changes in the current arrangements for the provision of transiting service and the network architecture of interconnection; (6) the base for universal service contributions must be broadened to reduce burdens and remove inequitable treatment, which is distorting competition; and (7) there must be reasonable transitions that are tailored to the needs of different classes of industry participants. The Commission should follow this broad agreement on key issues to establish a blueprint for reforming intercarrier compensation now.

Two topics about which the Commission asked specific questions stand out: (1) the Commission's legal authority to reform intrastate access charges; and (2) mechanisms by which carriers can recover revenues lost due to intercarrier compensation reform.

The Commission can and should preempt state regulation of intercarrier compensation. There is well-established legal authority for the Commission to implement reform of intrastate access mechanisms pursuant to a clear national policy to reduce arbitrage, promote competition, preserve universal service, and reduce regulation. State regulation of intercarrier compensation has become inconsistent with a necessary federal policy of intercarrier compensation reform and, thus, preemption is appropriate under the inseverability doctrine. In addition, intercarrier traffic is increasingly mixed and impractical to separate jurisdictionally and, therefore, the Commission can find that state regulation of such traffic must be preempted pursuant to the mixed-use doctrine.

Cost Recovery. The Commission's efforts to reform intercarrier compensation should focus on true reform – actions that stabilize intercarrier compensation arrangements and eliminate opportunities for arbitrage, while still ensuring that network providers have sufficient revenue to continue building, operating, maintaining, and upgrading networks. Hence, the Commission's reform efforts must encompass provisions that would permit local exchange carriers to recover access revenue lost in the reform process.

USTA supports adoption of an Access Restructure Mechanism (ARM), a concept that has been advanced in many of the intercarrier compensation reform proposals. USTA believes (1) an ARM should be implemented in conjunction with (2) modest and equitable adjustments in end user rates, while allowing carriers maximum flexibility in determining how to recover such increased charges from end users, and with (3) continued support from existing universal service support mechanisms, and where appropriate, with (4) some form of continued intercarrier compensation. Any ARM adopted by the Commission should be funded broadly, and distributions from an ARM should only be made to carriers that have provided access services. Additionally, distributions from the ARM should not be portable, and there should not be any required showing to receive support from the ARM, other than the loss of revenue from action taken in this proceeding.

The Commission's goal of one intercarrier compensation rate structure can be met successfully if the Commission follows the three fundamental principles and five core recommendations described above. Using this framework and the broad support in the record on key principles, the Commission can reform intercarrier compensation at this time. USTA strongly urges the Commission to use all of its wisdom and resources at this time to reform intercarrier compensation regimes in support of the goal of the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies."

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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

The Federal Communications Commission (Commission or FCC) recognized in the Further Notice of Proposed Rulemaking (*FNPRM*)[1] that there are substantial problems with current intercarrier compensation regimes, under which traffic is treated differently depending on the identities of the carriers, the jurisdiction of the call, and the underlying technology of the network on which the call originated. There is also considerable agreement in the record on many of the core elements of the ultimate solution to those problems. The task before the Commission is to select an appropriate path to transition the industry from the complicated, regulation-driven markets of today to the competitive, consumer-driven markets of the future. This task is vital; it is achievable; and it can be done now.

The United States Telecom Association (USTA) believes that the Commission will succeed with intercarrier compensation reform provided it upholds three fundamental principles: (1) networks are valuable and network owners must be compensated for that value; (2) universal service is a great public good that must be preserved and advanced; and (3) competition-based markets are superior to regulation and, therefore, competition should replace regulation wherever possible.

[1] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (March 3, 2005).

I. BACKGROUND

A. USTA's Comments Are the Result of Consensus Among a Broad and Diversified Membership

USTA represents a broad range of service providers and suppliers for the converged telecommunications and Internet industries. USTA members provide a full array of broadband and traditional voice, data and video services over wireline and wireless networks. In particular, most USTA members offer many or even all of the following services: (1) wireline local residential services; (2) wireline local business services; (3) wireline long distance services; (4) wireless services to both residential and business customers; (5) Internet access and data networking services in both residential and business markets; (6) diverse information services, including directory and operator services; and (7) video distribution services. Some USTA members are among the largest companies in the industry, with nationwide service territories; others are among the smallest companies, serving just one community each. Finally, USTA members serve nearly all of the nation's demographic and geographic segments, from the densest urban block to the most sparsely populated rural plain, and from as far east as Maine to as far west as Guam. Therefore, USTA's comments reflect a broad consensus among companies operating in all sectors of the converged telecom industry.

B. USTA's Fundamental Principles for Intercarrier Compensation Reform

Three fundamental principles underlie USTA's position on intercarrier compensation reform: (1) companies investing in and operating telecommunications networks need to have meaningful opportunities to be fully compensated for the value of their networks; (2) the ubiquitous reach of our nation's telecommunications infrastructure and the universal availability of high quality, affordable telecommunications services are great achievements that strongly contribute to the health of the American economy, so they must be preserved and advanced; and (3) market-based competition generally produces outcomes superior to those produced by regulatory fiat and, therefore, the Commission should endeavor to allow the competitive process to govern market outcomes wherever possible.[2]

Companies must be compensated for the value of their networks. Physical networks are the heart of telecommunications, and they will remain so for the foreseeable future. Even the rapidly growing wireless and Internet Protocol (IP)-enabled networks require substantial physical infrastructure just like traditional telecommunications networks. This critical physical infrastructure requires substantial capital investment and, once made, that investment is *sunk*—it cannot be readily moved or converted to another use. Therefore, companies investing in physical networks must be reasonably confident that they will have a realistic opportunity to recover the cost of their investment and make a competitive return on investment. Otherwise, service providers will not take the risk of making these critical investments.

Because of the magnitude of this risk, the Commission's decisions in this proceeding will affect more than just those companies that have made substantial investments in the past. These decisions also will have a powerful impact on future investment as the outcome will affect investor expectations for the foreseeable future. In sum, the Commission must recognize the value of companies' networks and work to ensure reasonable opportunities to realize competitive returns on those investments.

Universal service is a great achievement that must be preserved. The public telephone network is a leading example of the power of network economics—it is so valuable in

[2] Markets may not always meet social goals, such as universal service, consumer safeguards, disabilities access, and public safety objectives. Accordingly, the Commission may need to take limited ongoing actions to serve the public interest, even in otherwise deregulated markets.

significant part because it reaches nearly everybody. The more people that are connected to the network, the greater its value. Moreover, telecommunications is essential to economic development, so we all benefit when our nation's telecommunications infrastructure is extended to remote areas. For these reasons, universal service has been a strong national policy for nearly 100 years, and fulfilling this policy through the deployment of affordable, high-quality service in all parts of our country is a great achievement. Throughout most of the past century, intercarrier compensation has played an important role in universal service.

Intercarrier compensation reform must be accompanied by universal service reform so as to preserve and advance universal service.[3] Universal service is critically important for many consumers in this country to ensure that high-quality service is available at affordable prices. Since universal service support makes up the difference between end-user and intercarrier revenues on the one hand, and network and operational costs on the other hand, reductions in intercarrier revenues are likely to impact universal service needs. Accordingly, the Commission should ensure that universal service mechanisms are adequate and sustainable during and after the intercarrier compensation reform process.

Likewise, the Commission must ensure that universal service is fully funded, and that the burden of funding is fairly borne. With the contribution factor recently exceeding 11%, intercarrier compensation reform may further increase the size of the Universal Service Fund (USF or Fund). Such increases would put even further pressure on an already strained and inequitable system that treats some similar, competing services (e.g., cable modem and DSL

[3] The Commission could, of course, resolve the issues independently in the universal service proceeding, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, provided such reform does not preclude a holistic solution to intercarrier compensation reform.

services) differently. As such, it is imperative that the Commission reform the current contribution methodology to make it sustainable going forward.

Market-based competition generally produces outcomes superior to those produced by regulatory fiat. The Commission should create an environment in which commercial transactions between private parties can thrive. The Telecommunications Act of 1996 (1996 Act) was signed into law with the express purpose to "promote competition and reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies."[4] Commercial arrangements made in competitive, consumer-driven markets generally will be more able than the Commission to produce innovation, efficiency, high quality services, and low prices. Whereas today's rules for intercarrier compensation stand in the way of the policies of the 1996 Act, the Commission can and should adopt default rules that are consistent with the 1996 Act's purposes by promoting competition and reducing government intervention, while ensuring that the rural and insular high-cost areas of our nation continue to receive affordable high quality telecommunications service.

C. USTA's View of the Need for Reform

The current system of intercarrier compensation regulation imposes inefficiencies, promotes arbitrage, and creates unnecessary administrative costs. As the Commission and parties commenting in the record have demonstrated, the current system of intercarrier compensation regulation is broken.[5] Currently, the application of different rates depending on

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[4] Preamble to the 1996 Act, which can be found at Committee on Energy and Commerce, U.S. House of Representatives, *Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce*, Communications Law at 413 (April 2003).

[5] *FNPRM* ¶¶ 15-28.

the type of traffic often creates arbitrage opportunities. For example, the termination of a call on a given loop can be charged as little as less than one-tenth of a penny per minute or as much as several cents per minute depending on the source of the call, even though the cost of providing such termination is roughly the same. This fact alone causes allocative inefficiency as providers and customers respond to regulator-imposed rather than market-driven price signals.

Beyond causing inefficiency, the arbitrage and competitive distortions produced by the current intercarrier compensation regimes' disparate treatment of traffic threaten the three core principles advocated by USTA. Network owners are seeing increasing threats to their opportunity to recoup their investments as users mischaracterize traffic and take advantage of loopholes to avoid lawful charges established for cost recovery.[6] The unpredictability and risk associated with arbitrage and competitive distortion, therefore, are harming network investment and innovation. In addition, as rural networks are even more dependent on intercarrier compensation than are networks in more densely-populated areas, the current problems are threatening universal service. Finally, this government-managed competition is thwarting the development of truly competitive markets.

[6] USTA members, and ultimately their customers, have been subject to mischaracterization techniques such as rerouting traditional long-distance traffic to hide its origins and altering signaling parameters that identify originating callers, both of which facilitate avoidance of higher rates for particular categories of toll traffic. Even in the absence of deliberate acts such as these, miscategorization and arbitrage are facilitated because a significant amount of traffic lacks sufficient information to track geographic origins. Examples include some wireless traffic, scenarios involving ported numbers, and many virtual NXX services. Further, Voice over Internet Protocol (VoIP)-originated traffic may often be sent without adequate geographical identification even when carried on the public switched telephone network (PSTN).

The current varying regimes for intercarrier compensation are also administratively costly and impose substantial overhead compliance burdens on providers. Substantial differences in the treatment of traffic create an expensive and uncertain process for resolving regulatory disputes over the proper treatment of traffic and the collection of monies owed. Indeed, the Commission and providers alike have just expended countless hours and dollars disputing the appropriate treatment for particular types of traffic in the *Level 3,*[7] *Sprint,*[8] *T-Mobile,*[9] *and AT&T Calling Card*[10] proceedings. Moreover, the ability to dramatically reduce costs by reclassifying traffic presents some carriers using intercarrier termination services with an irresistible incentive to misclassify traffic, which further burdens the entire industry with costly monitoring and enforcement processes. This inefficiency and administrative uncertainty further inhibits investment and thwarts technological innovation.

The problems that the current intercarrier compensation regime was designed to solve have changed, so new rules will work better. The current system of intercarrier compensation rules has its roots in the early part of the twentieth century, when service was far from universal and there was only one long distance provider (*i.e.*, AT&T). Technological evolution and competitive policy have produced many long distance networks, however, and competitive

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[7] *Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c) from Application of Section 251(g) of the Communications Act of 1934*, WC Docket No. 03-266, *withdrawn*, Letter from John T. Nakahata, Counsel to Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 21, 2005).

[8] *Sprint Petition For Declaratory Ruling Regarding The Routing And Rating Of Traffic By ILECs*, CC Docket No. 01-92, *pending*.

[9] *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Report & Order, 20 FCC Rcd 4855 (2005).

[10] *AT&T Corporation Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services/Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133, Order, 20 FCC Rcd 4826 (2005).

local networks are now present and growing throughout the country. Interconnection between telecommunications carriers is required both by law and by the imperatives of competitive markets. Moreover, even the relatively modern 1996 Act failed to anticipate technological evolution and the erosion of regulatory classifications through innovations such as VoIP. Thus, because the current intercarrier compensation rules address an environment that no longer exists, they are increasingly unworkable and detrimental to the public interest. Accordingly, consumers and telecommunications providers will be better served by moving away from pervasive regulation and toward deciding intercarrier compensation arrangements through commercial dealing where possible.[11]

D. There Is Broad Agreement on Both the Need for Reform and the Advantage of Moving Toward Competitive, Consumer-Driven Markets; the Commission Should Bridge the Gap by Choosing an Appropriate Path from Here to There

The Commission presented a strong case in the *FNPRM* for reforming the system of rules and regulations that currently governs intercarrier compensation.[12] Based on general agreement in the record before it, including comments filed by USTA,[13] the Commission concluded that it must "replace the existing patchwork of intercarrier compensation rules with a unified approach … [because the current scheme] is increasingly unworkable in the current environment and creates distortions in the market at the expense of healthy competition."[14]

[11] The Commission needs to maintain default rules to facilitate negotiation and preserve competitive markets. Also, rate of return providers must have the option to remain under rate of return and continue to participate in pooling in a commercial framework.

[12] *FNPRM* ¶¶ 15-28.

[13] Comments of the United States Telecom Association, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Aug. 21, 2001); Reply Comments of the United States Telecom Association, *Developing a Unified Intercarrier Compensation Regime*¸ CC Docket No. 01-92 (Nov. 5, 2001) (*USTA Intercarrier Compensation Reform Reply Comments*).

[14] *FNPRM* ¶ 3

The Commission also established its goals for intercarrier compensation reform: (1) encourage investment in telecommunications networks and the development of efficient competition;[15] (2) preserve universal service; (3) achieve competitive and technological neutrality; and (4) minimize regulatory intervention and enforcement.[16]

The Commission's goals are consistent with USTA's key principles, and USTA supports the Commission's goals. In establishing these goals, the Commission noted general agreement on the goals among parties commenting on the record (while acknowledging differences among commenters on specific goals). As the Commission has indicated on many occasions, those goals can be best served through the "pro-competitive, deregulatory national policy framework"[17] established in the Telecommunications Act of 1996. Accordingly, the ultimate goal is also clear—the Commission should rely on competitive, consumer-driven markets characterized by commercial arrangements where feasible.

Consumers ultimately will be the biggest beneficiaries from positive intercarrier compensation reform. Competitive, consumer-driven markets will produce choices that respond first and foremost to consumer preferences. Reducing arbitrage and administrative costs will also lead to lower prices and simpler terms of service. Positive intercarrier compensation reform also will reduce disincentives for network investment, which will lead to wider deployment of better infrastructure and greater availability of innovative services.

[15] USTA assumes that the Commission is interested in investment in all networks, including those owned by USTA member incumbent local exchange carriers (ILECs). Not only do these networks account for a substantial percentage of telecommunications infrastructure, efficient competition would not thrive if significant competitors were effectively prevented from investing in their networks.

[16] *FNPRM* ¶¶ 31-33

[17] H.R. Rep. No. 104-458, at 1 (1996).

Finally, but very importantly, positive intercarrier compensation reform accompanied by related universal service reform will ensure predictable and adequate support for universally available, affordable services for all Americans.

The elements of a default solution that will move the industry from its current patchwork of intercarrier compensation rules to competition-based markets can be organized into seven basic decision points:

1. Where shall providers exchange traffic? (This includes a decision as to which provider will bear the costs of transporting traffic to and from the point of interconnection.)
2. At what price(s) shall they exchange traffic? (There appears to be industry agreement at least that price(s) should not vary by jurisdiction, service, or technology.)
3. How will providers recover revenue lost through the transition to a uniform rate structure?
4. How will that replacement revenue be collected?
5. How will providers obtain transit to interconnection points to which they are not connected?
6. Who will oversee these decision points? And,
7. How gradually will the transition take place on each decision point?

The Commission has before it a record with a number of plans presenting possible combinations of answers to each of these questions. The specific proposals before the Commission reflect the tradeoffs between different elements of an intercarrier compensation regime. Each plan ought to be given thoughtful consideration as it reflects the considered judgment of many parties as to how to resolve competing interests and consequences of intercarrier compensation reform.

USTA believes that it is important that the Commission recognize that today it can find an appropriate combination of answers to these seven questions that will establish a set of transitions and default rules to guide the establishment of market arrangements. In so doing, the Commission should recognize that regulatory perfection is likely to be the enemy of the good here. Pursuit of perfection will harm the public interest as it will delay much-needed reform in return for little incremental benefit.

II. USTA'S FIVE CORE RECOMMENDATIONS FOR INTERCARRIER COMPENSATION REFORM

The Commission's goal of one intercarrier compensation rate structure can be met successfully if the Commission follows USTA's three fundamental principles—network owners must have the opportunity to be fully compensated for their investments, universal service must be preserved and advanced, and competition-based markets are generally better than regulatory mandates. To help the Commission choose an ultimate solution that supports these three key principles, USTA has five core recommendations for the Commission:

(A) minimize regulatory arbitrage with a default intercarrier rate structure that treats traffic uniformly;

(B) integrate universal service reform with intercarrier compensation reform, paying particular attention in both cases to the unique needs of rural, insular, and 2% service providers;

(C) rely in the first instance on competition and commercial agreements where possible to determine market outcomes;

(D) ensure that the restructuring of intercarrier compensation should not itself cause additional reductions in net revenue to make certain that LECs are compensated for the use of their networks; and

(E) facilitate indirect interconnection by ensuring that transit service is available for voice traffic.

Each of these five core recommendations has important implications for many of the seven questions that the Commission must answer when solving the issues of intercarrier compensation reform.

A. The Commission Should Minimize Regulatory Arbitrage with a Default Intercarrier Rate Structure that Treats Traffic Uniformly

The first recommendation that should guide the Commission at each decision point is to remove the artificial incentives for regulatory arbitrage produced by disparate treatment of traffic with the same functionality. The nation's telecommunications markets can no longer tolerate the disruption produced by arbitrary distinctions between jurisdictions, customers, or technologies when the same function is performed in each case. As is supported by near universal agreement in the record, the Commission should move to minimize arbitrage by adopting a uniform rate structure for this traffic regardless of the identity of the service provider, the jurisdiction of the call, or the underlying technology (e.g., wireless, wireline, cable, etc.) with which the call was made. Accordingly, the Commission should follow through on its expressed interest in adopting a uniform rate structure.[18] As discussed below, the Commission has the necessary authority to implement a uniform rate structure for all intercarrier compensation because the public interest is clearly served by reducing arbitrage, which necessarily requires functionally equivalent traffic to be treated the same without regard to jurisdiction, service, or technology.

In the first instance, the Commission should rely on individual carrier commercial agreements to govern intercarrier compensation, thereby allowing the marketplace to determine the appropriate value for traffic exchanges. Therefore, the uniform rate structure adopted by

[18] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).

the Commission should only be a *default* rule, allowing providers the freedom to negotiate other arrangements where it makes sense as a commercial matter. Technologies and services evolve; thus, it is imperative that the Commission not fall into the trap of prescribing new rules that will, over time, become just as outdated and inefficient as the ones it is seeking to reform today. USTA submits that its first principle of ending regulatory arbitrage through a transition based on a default uniform rate structure must be implemented in a way that facilitates, and does not inhibit, providers' deployment of new technologies. The future of the wireline business, and possibly the wireless one as well, is tied to growth in the deployment of broadband and next-generation networks (NGN) because they will allow providers to integrate traffic more efficiently, and to offer integrated service offerings more effectively. Default interconnection rules must not, therefore, be permitted to maintain or create artificial distinctions that inhibit the growth of service bundles being deployed over NGN.

B. The Commission Must Integrate Universal Service Reform with Intercarrier Compensation Reform, Paying Particular Attention in Both Cases to the Unique Needs of Rural, Insular, and 2% Service Providers

The current universal service system is under considerable strain and the contribution methodology is unfair. The federal Universal Service Fund (USF or Fund) contribution factor is growing over time at an unsustainable rate because, in part, the base of contributions is being eroded by changing markets and technologies,[19] and certain arbitrage strategies are being utilized by some carriers to avoid making contributions to universal service support.[20] Yet, the demand for universal service support continues to grow, particularly as more competitive

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[19] Notably, direct competitors, such as cable modem service providers and bring-your-own access VoIP providers, are not currently contributing to the Fund.

[20] For example, AT&T has admitted that it did not contribute to universal service support for interstate end user revenues received from its prepaid calling card service.

eligible telecommunications carriers are designated and seek support from the Fund. All of this strain is clearly exhibited in continuing increases in the contribution factor, which has recently topped 11% of interstate and international end-user revenues. Without reform of the universal service contribution methodology, this strain on the system will continue to grow. Moreover, resolution of the universal service funding crisis is a critical component for any reform of intercarrier compensation.

All of the current intercarrier compensation reform plans include reductions in access revenue that some carriers are unlikely to be able to recover entirely through end-user rate increases. It is important to be mindful that intercarrier compensation reform must not harm nationwide availability of affordable high-quality telecommunications services at reasonably comparable rates in urban and rural areas. Accordingly, it is imperative that the Commission take steps to reform and secure universal service at the same time as it undertakes intercarrier compensation reform.

It cannot be overstated that a critical component of any intercarrier compensation reform plan must include reform of the contribution methodology used to fund the USF in order to ensure that the system of support is "specific, predictable, and sufficient . . . to preserve and advance universal service."[21] As USTA will discuss more fully below, reform of intercarrier compensation will require some combination of modest and equitable increases in end user rates, support from an Access Restructure Mechanism (ARM), intercarrier compensation payments, and continued support from a stable USF. USTA believes that a stable USF can be achieved by broadening the base of contributors to the USF, as well as implementation of a contribution mechanism that is based on connections (which may include

[21] 47 U.S.C. § 254(d).

numbers and number equivalents). In any event, all broadband providers must be treated in the same fashion; there should not be one rule for cable modem service and another for DSL service.

The separate ARM should also be funded broadly by all users of the public telecommunications infrastructure. In addition, like contributions to the USF, contributions to the ARM should be based on connections (which may include numbers and number equivalents). Support from the ARM should be made available only to carriers that currently provide access service.[22] Finally, support from the ARM should not be portable—it reflects a calculation of otherwise un-recovered costs that are unique to the affected carrier.[23] An ARM fails to meet its purpose if made portable.

C. The Commission Should Rely in the First Instance on Competition and Commercial Agreements Where Possible To Determine Market Outcomes

USTA agrees with the Commission's conclusion in the *FNPRM* that reform of intercarrier compensation should promote efficient networks and foster facilities-based competition.[24] Facilities-based competition between efficient networks is the surest prescription for competitive markets. Accordingly, as the Commission resolves issues and selects a set of rules to guide the industry on the transition to competitive, consumer-driven markets, the Commission should adopt policies and decisions that promote network investment.

[22] Competitive Local Exchange Carriers (CLECs) that charge access would be eligible to receive support from the ARM.

[23] In fact, there is no need for portability because any carrier that is eligible for ARM support and that acquires new customers, whether from another carrier or not, would simply request additional support from the ARM based on its need by virtue of its acquisition of new customers.

[24] *FNPRM* ¶ 31.

Clear, predictable, and stable default rules will help accomplish this goal. Thus, for example, a uniform rate structure for intercarrier compensation is consistent with the Commission's emphasis on facilities-based competition. So is technological neutrality as markets will be more able to adapt to technological innovation. A default uniform rate structure should not be based on TELRIC, however, as that would inhibit network investment.[25] The Commission also needs to take account of the different circumstances faced by providers serving high-cost areas.

There is broad support for reforming intercarrier compensation today to promote the development of commercial arrangements. In this regard, the rules that the Commission adopts in this proceeding should be *default* rules that only apply where parties are unable to agree to terms between and among themselves. The default rules should facilitate, rather than substitute for, negotiation. Individual agreements will best reflect costs, adapt to technological change, minimize or eliminate arbitrage, and promote competition. To facilitate negotiation, the Commission should reform the current regime (1) to include an ARM in conjunction with (2) modest and equitable adjustments in end user rates, while allowing carriers maximum flexibility in determining how to recover such increased charges from end users, and (3) continued support from existing universal service support mechanisms and, where appropriate, (4) some form of continued intercarrier compensation. In addition, the default rules should account for differences in bargaining power between providers seeking interconnection.

[25] *E.g.,* Reply Comments of the United States Telecom Association, Statement of Larry F. Darby, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No 01-92 (Aug. 19, 2001); Comments of BellSouth, *Developing a Unified Intercarrier Compensation Regime,* CC Docket No 01-92 (Aug. 21, 2001).

The Commission should also strive to eliminate obstacles to flexible pricing and service innovation. In this regard, intercarrier rate and universal service contribution distinctions based on jurisdiction, service, or technology generally harm competition and ought to be eliminated. Similarly, providers should have pricing flexibility with respect to regulated end-user rates, such as the Subscriber Line Charge (SLC).

In sum, as the industry moves forward with increasing competition and deployment of new technologies, regulation of intercarrier compensation should diminish and, after a transition, voice services and the networks on which they are provided should be regulated to the same minimal extent as are other competitive markets, with the caveat that default rules for intercarrier compensation remain in place to facilitate negotiation.

D. The Commission Should Ensure that the Restructuring of Intercarrier Compensation Should Not Itself Cause Additional Reductions in Net Revenue To Make Certain that LECs Are Compensated for the Use of Their Networks

The Commission seeks comment about how providers will make up for any revenue reductions resulting from intercarrier compensation reform.[26] Although the Commission asks the questions in separate sections for carriers under price cap and rate-of-return regulation, many of the questions are the same. USTA submits that it is critically important that providers have comparable revenue opportunities before and after intercarrier compensation reform regardless of the regulatory construct under which they operate. To achieve such revenue neutrality, the restructuring of intercarrier compensation should not itself cause additional reductions in net revenue to ensure that LECs are compensated for the use of their networks. Importantly, broadband deployment would be adversely impacted if the process of intercarrier

[26] *FNPRM* ¶¶ 98-115.

compensation reform substantially reduces LEC cash flows. Similarly, consumers will also be harmed in the absence of such a policy, as it will become increasingly difficult to maintain carrier of last resort obligations.

Moving to a uniform default rate structure undoubtedly will cause many LECs to experience reductions in access revenues. In connection with these prescribed reductions, there should be the opportunity for modest, equitable increases in end-user rates as well as the use of other recovery vehicles in order to compensate the carrier for the use of its network. The Commission must be particularly mindful of the need to ensure that increases in the amounts LECs are forced to attempt to recover from end users do not cause rate shock or unaffordable rates. Similarly, the amounts left for LECs to recover from end users must not go so high as to deny each LEC a meaningful opportunity to recover its costs. Accordingly, some LECs may have to recover access revenue reductions through an ARM. Any revenue recovery mechanism the Commission adopts should allow carriers maximum flexibility to determine the best recovery options to fit their individual needs.

E. The Commission Should Facilitate Indirect Interconnection by Ensuring that Transit Service Is Available for Voice Traffic

Transit service is generally understood as the use of the facilities of a LEC (or sometimes a third-party provider) to transport traffic from one telecommunications carrier to another.[27] It is not economically feasible for every provider to interconnect directly with every other provider, particularly in more sparsely-populated areas where traffic flows are less heavy.

[27] *See Qwest Corp. v. FCC*, 346 U.S. App. D.C. 271, 252 F.3d 462, 468 (D.C. Cir. 2001) (citing *TSR Wireless, LLC v. U S WEST Communications, Inc.*, 15 F.C.C.R. 11,177 n.70, 2000 WL 796763 (2000)) (the FCC defines "transiting traffic" as "traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the [terminating] carrier's network").

Therefore, telecommunications service providers undertake to deliver traffic indirectly by delivering it to another carrier that does have direct interconnection with the originating provider. This switching and transport functionality is called transit service, and it is essential to the operation of efficient telecommunications markets.

USTA members currently provide transit service under tariff and on commercially-negotiated terms. As competitive markets evolve, more transit options will become available. In the meantime, the Commission needs to accommodate existing arrangements and facilitate and not impede new ones.

III. RESPONSES TO SPECIFIC QUESTIONS IN THE FNPRM

USTA offers the following answers to specific questions in the FNPRM in addition to the three fundamental principles and five core recommendations discussed above. These answers to the Commission's questions follow USTA's fundamental principles, and they elaborate on USTA's core recommendations. They do not, however, limit the scope of the principles and recommendations; USTA urges the Commission to follow USTA's fundamental principles and core recommendations throughout the entire intercarrier compensation reform process, and not just in response to the specific issues raised in the FNPRM. The rest of these Comments largely follow the format of the *FNPRM*, providing answers to Commission questions in roughly the same order as they were asked.

A. There Is Broad Agreement Among the Plans on the Salient Points

The Commission asks parties to comment on the plans for reforming intercarrier compensation that have been filed in this proceeding.[28] USTA has carefully reviewed each of

[28] *FNPRM* ¶¶ 39-59.

the proposals in the record,[29] and we are struck by the large degree of agreement on major issues. While there are few points where all proposals are in agreement, there is broad agreement among many of the proposals on the following seven key issues:

(1) there should be a uniform rate structure that treats functionally equivalent traffic the same without regard to jurisdiction, service, or technology;

(2) reform may require modest, equitable increases in end-user rates;

(3) an Access Recovery Mechanism should be created in addition to end user rate increases, and it should be administered so as to give LECs the opportunity to recover revenue reductions in interstate and intrastate access charges;

(4) the base for universal service contributions must be broadened to reduce burdens and remove inequitable treatment, which is distorting competition;

(5) there should not be any sudden or dramatic changes in the current arrangements for the provision of transiting service and the network architecture of interconnection;

(6) the Commission should preempt state commission jurisdiction over intrastate access charges to the extent necessary to unify the rules for intercarrier compensation; and

(7) there must be reasonable transitions from current rules through implementation of intercarrier compensation reform principles that are tailored to the needs of different classes of industry participants.

[29] USTA does not address here the two proposals put forth by the Commission in the *Intercarrier Compensation NPRM*. Rather, USTA stands by its Comments and Reply Comments filed in response to that NPRM, and refers the Commission and interested parties to those filings.

The Commission should build on this broad agreement to establish a blueprint for reforming intercarrier compensation now. The Commission can resolve the remaining areas of disagreement based on the record before it.

Uniform Rate Structure. Most of the plans on the record move toward a uniform rate structure for intercarrier compensation. The Commission tentatively concluded at the outset of this proceeding that the public interest would be served by adopting a uniform rate structure for functionally equivalent traffic,[30] and most of the plans move in this direction. The Commission should follow its conclusion and the general agreement in the record by finding that, in the absence of parties reaching commercial agreements for intercarrier compensation, a uniform rate structure for such traffic is the appropriate default mechanism to achieve the goal of ending regulatory arbitrage and freeing competitive markets to operate efficiently.

Modest, Equitable Increases in End-User Rates. Most of the plans presented to the Commission contain some increases in end-user rates, primarily through increases in the Subscriber Line Charge (SLC). The amount of increase varies from plan to plan and, while the gap between the largest and smallest increases is rather large, the general approach is to ensure that end-user rate increases are relatively modest, occur over time, and seem equitable. End user rate adjustments are one means for assuring carriers can recover their costs.

Access Restructure Mechanism. Another common theme in the plans before the Commission is the creation of a new mechanism to provide LECs with replacement revenue needed to make up for reductions in access charges not recoverable through increases in end user rates and/or current universal service support. Together, these four mechanisms are the only avenues for assuring carriers are made whole from such reductions.

[30] *Intercarrier Compensation NPRM* ¶ 36.

Broader Base of More Equitable Universal Service Contributions. Those plans that address universal service issues that are linked to intercarrier compensation reform generally seek to make contributions more equitable and sustainable, at least in principle. Currently, not all providers of competing services contribute to universal service, which distorts competition and threatens universal service because the contribution base continues to erode partly as a result of such inequitable treatment. There appears to be broad agreement, however, that universal service funding must not distort competition and not be subject to arbitrage if intercarrier compensation reform is to be successful. Accordingly, USTA urges the Commission to adopt a more equitable and sustainable contribution methodology as described in these comments.

Transiting and Network Architecture. Most of the plans have a component addressing indirect interconnection, and the availability of transit services. USTA members currently provide transit service under tariff and on commercially-negotiated terms. As competitive markets evolve, more transit options will become available. In the meantime, the Commission needs to accommodate existing arrangements and facilitate and not impede new ones. In addition, many plans are sensitive to the existing configuration of networks, an effort with which USTA agrees.

Jurisdiction over Intrastate Access. Most of the proposed plans accomplish the goal of a uniform rate structure, in part, by having the Commission exercise jurisdiction over intrastate access services. USTA agrees that this is the preferred approach for implementing intercarrier compensation reform and moving to competitive, consumer-driven markets. As we discuss below, USTA believes the Commission has jurisdiction to address all intercarrier compensation, including intrastate access.

Reasonable Transitions. Whichever route the Commission chooses, it must implement reasonable transitions tailored to the diverse needs of providers throughout the industry. The problems with intercarrier compensation are systemic and largely the result of outdated regulation. Accordingly, it is incumbent on the Commission to solve those problems without unduly burdening any one segment of the industry. In particular, an appropriate transition would include staged rebalancing among end user rates, intercarrier rates, and an Access Restructure Mechanism so as to minimize rate shock and ensure that markets and providers' operations are able to adjust smoothly to the new regime.

B. Calculating Additional Cost Consistent with Section 252(d)(2)

The Commission notes in the *FNPRM* that "the use of the TELRIC standard for reciprocal compensation has created some problems."[31] USTA could not agree more; TELRIC has created many problems and, it would provide a particularly bad foundation for a uniform intercarrier compensation rate structure. TELRIC discourages network investment. It also depends on administrative cost calculations that are difficult, costly, and time-consuming, which imposes considerable regulatory costs that ultimately are borne by consumers. Moreover, small and mid-sized companies seldom have sufficient staff and budget to bear these costs.

The Commission asks a number of questions in the FNPRM about the extent to which switching capacity is traffic sensitive, to what extent switching capacity will become unconstrained with Internet-protocol switching, and whether the Commission should adopt a true incremental cost standard (as opposed to one that includes some degree of averaging) as a

[31] *FNPRM* ¶ 66.

measure of "additional cost".[32] The sheer number and complexity of the Commission's questions demonstrates the extent to which regulatory efforts at precise cost measurement expend considerable resources without yielding meaningful benefits. In fact, many of the Commission's questions appear to reflect possible misunderstandings about the nature of switching capacity. Switching costs vary depending on usage because switching capacity is never unlimited as the Commission suggests. In fact, contrary to the Commission's assertions, switching costs appear to be more variable with some softswitch deployments than with prior generations of switching technologies due to the high degree of modularity in the softswitches' units of capacity. This illustrates how counterproductive it would be for the Commission to proceed down a path of attempting precise cost determinations for default intercarrier compensation rates.

C. The Commission Can Unify All Intercarrier Compensation, Including Intrastate Access, Pursuant to a Clear National Policy To Reduce Arbitrage, Promote Competition, Preserve Universal Service, and Reduce Regulation

The Commission has asked about the legal basis for it to exercise jurisdiction over intrastate access mechanisms in order to adopt a uniform intercarrier compensation rate structure that will reduce arbitrage, promote competition, protect universal service, and reduce regulation.[33] Section 2(a)[34] of the Communications Act of 1934, as amended (Act), gives the Commission exclusive jurisdiction over interstate communications, while Section 2(b)[35] of the Act reserves to states jurisdiction over intrastate services. Because access charges for intrastate

[32] *FNPRM* ¶¶ 66-73.

[33] *FNPRM* ¶¶ 78-82.

[34] 47 U.S.C. § 152(a).

[35] 47 U.S.C. § 152(b).

traffic historically have been within the exclusive jurisdiction of state commissions, the Commission is concerned about its legal authority to implement intrastate access reform. The Commission shall be assured, however, that there is clear legal authority to implement reform of intrastate access mechanisms pursuant to a clear national policy to reduce arbitrage, promote competition, preserve universal service, and reduce regulation.

1. Section 201 of the Act Clearly Grants the Commission the Authority To Preempt State Law

The Commission may preempt state jurisdiction of access traffic under section 201 of the Act. Section 201[36] gives the Commission authority to implement the requirements of the 1996 Act establishing competitive markets. Establishing competitive markets arguably could require uniform intercarrier compensation without regard to the pre-1996 Act effect of section 2(b).[37] More specifically, section 201(b)[38] authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." In *AT&T v. Iowa Utils. Bd.*,[39] the United States Supreme Court confirmed that section 201(b) rulemaking jurisdiction is not limited to jurisdictionally interstate matters covered in section 201 but extends to all provisions of the Act including provisions added by the 1996 Act encompassing matters that fell within the exclusive jurisdiction of the states before 1996. Therefore, the Commission may adopt rules implementing statutory provisions

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[36] 47 U.S.C. § 201.

[37] Should it be found to cover intrastate access, section 201 authority is explicitly preserved by 47 U.S.C. § 251(i), a savings provision that states, "Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

[38] 47 U.S.C. § 201(b).

[39] *AT&T v. Iowa Utils. Bd,* 525 U.S. 366, 377-86 (1999).

governing intercarrier compensation and interconnection of traffic—whether intrastate or interstate—within the scope of those statutory provisions.

2. State Regulation of Intercarrier Compensation Is Inconsistent with a Unified Federal Intercarrier Compensation Policy and, thus, Preemption Is Appropriate Under the Inseverability Doctrine

The Commission should preempt state regulation of intercarrier compensation because it is inconsistent with a unified federal intercarrier compensation policy, just as state regulation of the use of terminal equipment is inconsistent with federal regulation and can, therefore, be preempted. In *North Carolina Utils. Comm'n v. FCC*,[40] when the Commission acted within its authority to permit subscribers to provide their own telephones, the Fourth Circuit upheld the Commission's preemption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service because the state regulation would negate the federal tariff: "Because separation of terminal equipment used exclusively for local communication is a practical and economic impossibility, the proposed state rules would have scuttled the federal interconnection policy."[41] This argument for the basis of preemption is often referred to as "the impossibility exception" to section 2(b)(1) or "the inseverability doctrine."

The inseverability doctrine has been approved and used by the U.S. Supreme Court. In *Louisiana Pub. Serv. Comm'n v. FCC,*[42] the Supreme Court confirmed that preemption is possible under the inseverability doctrine, writing that federal preemption is appropriate "where it was not possible to separate the interstate and intrastate components of the asserted FCC

[40] *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

[41] *Id*. at 1043.

[42] *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986).

regulation"[43] or where a state regulation "would negate" a federal regulation.[44] The Commission recently applied the inseverability doctrine when it concluded that Vonage's DigitalVoice service could not be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules.[45]

The Commission has established a clear national policy of reducing intercarrier arbitrage, which is thwarting achievement of the 1996 Act goals of competition, deregulation, and universal service. A major source of this arbitrage lies in the different treatment of functionally equivalent access traffic between the state and federal jurisdictions. Accordingly, state regulation *would negate* federal regulation as it would preserve arbitrage opportunities in direct opposition to valid Commission regulations implementing important federal objectives. Just as it was impossible to maintain separate state and federal regulation of terminal equipment once the Commission sought to deregulate the market, it simply is no longer possible to separate the interstate and intrastate components of intercarrier compensation when competition, deregulation, and universal service require that both interstate and intrastate traffic be treated the same.

Another example of the exercise of preemption under the inseverability doctrine is *PUC of Maryland v. FCC*.[46] In that case, the D.C. Circuit found that the Commission properly preempted states from setting rates charged by LECs to IXCs for disconnection of local

[43] *Id*. at 375-76 n.4.

[44] *Id*.

[45] *Vonage Holdings Corp. Petition for Decl. Ruling Concerning an Order of the Minnesota Pub. Utils. Comm'n*, WC Docket No. 03-211, Memorandum Opinion and Order, ¶ 15, n.86 (rel. Nov. 12, 2004) (*Vonage Order*). Citing *Louisiana Pub. Serv. Comm'n*, the Commission stated that it could find no plausible approach to separating DigitalVoice into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without negating federal policy and rules.

[46] *Pub. Utils. Comm'n of Maryland v. FCC*, 909 F. 2d 1510 (1990).

customers' telephones for failure to pay a bill. The disconnection service called DNP involved total disconnection, preventing a customer from using his or her telephone for both interstate and local calls. In reaching its decision, the Court stated that Commission preemption of state regulation is permissible when (1) the matter to be regulated has both interstate and intrastate components, (2) Commission preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would "negate[] exercise by the FCC of its own lawful authority" because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[47] The DNP service had both intrastate and interstate aspects because the disconnection prevented a customer from making both types of calls. In addition, the Court found that preemption promoted valid federal goals of preventing states from subsidizing local service with interstate revenues and of promoting competition in a service to interstate carriers. Finally, the Court noted that the Commission found it technically impossible to disconnect service for in-state calls without also disconnecting service for out-of-state calls.

Just as it was necessary to preempt state regulation regarding disconnection because there was no way to maintain different rules for disconnection, it is becoming necessary to preempt intrastate treatment of intercarrier compensation because it is becoming impossible to maintain separate rules for intrastate and interstate traffic. With voice traffic increasingly moving to wireless service and IP-enabled services (both of which are interstate in nature), existing mechanisms for ascertaining the geographical end points of calls are becoming obsolete. Wireless handsets and many IP-enabled handsets are mobile in nature—they are routinely used to connect to their respective networks in many different geographic locations, even during the course of the same day. These mobile handsets are identified by the same

[47] *Id*. at 1515.

numbers without regard to where they are used to originate or terminate calls and it would at best be impractical and very expensive to develop new mechanisms for separating traffic. Moreover, even if it were practical to separate wireless and IP-enabled traffic, disparate treatment would continue to send the wrong signals to market participants, thereby frustrating valid federal objectives by distorting competition, thwarting deregulation, and undermining universal service.

In sum, intercarrier compensation is no longer readily severable into interstate and intrastate components and should, therefore, be classified as interstate, subject to the Commission's jurisdiction. The Commission cannot achieve its goal of implementing a rational compensation scheme that limits arbitrage and encourages competition with a separate intrastate access regime in place. Moreover, as it becomes more and more difficult to distinguish intrastate from interstate traffic, the opportunities for arbitrage increase.[48] This increased arbitrage distorts competition and interferes with the pro-competitive deregulatory goals of the 1996 Act. Consequently, state jurisdiction over intercarrier compensation must be preempted under the inseverability doctrine.

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[48] *See, e.g.*, *Level 3 Communications LLC Petition for Forbearance,* WC Docket No. 03-266, IP-Enabled Services, WC Docket No. 04-36, USTA Notice of Ex Parte Presentation (Feb. 17, 2005) (opposing Level 3 petition for forbearance from rules regarding interstate access charges paid by long distance companies using VoIP to deliver traffic to the public switched telephone network). *See also*, Letter from James W. Olson, Vice President-Law and General Counsel, United States Telecom Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, *Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133 (Nov. 22, 2004) (disputing AT&T's claim that calls made using its prepaid calling card service were interstate in nature and, therefore, not subject to intrastate access charge payments).

3. Intercarrier Traffic Is Increasingly Mixed and Impractical To Separate Jurisdictionally and, therefore, State Regulation of Such Traffic Must Be Preempted

A related but different basis for preemption of state jurisdiction is that when it becomes impossible to separate traffic jurisdictionally, intrastate jurisdiction should be preempted, just as intrastate regulation of mixed-use private lines has been preempted.[49] The Commission has held that "mixed-use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to FCC jurisdiction because traffic on such lines cannot be measured without significant administrative efforts.[50] Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line.[51] More recently, the Commission held that the global portability feature of Pulver.com's Free World Dialup service, which enables a user to initiate and receive online communications from anywhere in the world without reference to the actual physical location of an underlying IP address, is an interstate information service in accordance with the mixed-use doctrine because it is impossible or impractical to attempt to separate the service into intrastate and interstate

[49] Although some of the case law seems to merge the inseverability and mixed-use doctrines, they are distinct. The inseverability doctrine is applicable when it may well be possible to separate traffic but there is a conflict between state and federal regulation, as in the terminal equipment case, *North Carolina v. FCC*, 552 F.2d 1036, and the mixed-use doctrine is applicable when it is not practical to separate intrastate and interstate traffic, as in the private lines case, *MTS and Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*Interstate Private Lines*).

[50] *Interstate Private Lines*, 4 FCC Rcd at 5660.

[51] *MTS and Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 4 FCC Rcd. No. 3 1352. *See also GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22466, FCC 98-292, at 14-15 (1998) (*MTS and WATS Market Structure Order*). (While some transmissions passing over an Internet access line might have been intrastate in nature, the interstate component was not *de minimis*, and, therefore, GTE's Internet transport service was subject to interstate jurisdiction under the mixed-use doctrine).

components.[52] Similarly, the Commission found that when a company such as Vonage had no service-driven reason to separate intrastate components of its services, such services would be treated as jurisdictionally interstate and state regulation would be preempted.[53]

As mentioned above, intercarrier traffic is increasingly mixed and impractical to separate jurisdictionally. Moreover, the Commission directly addressed the issue in *pulver.com* and clearly determined that certain characteristics of IP-enabled services are mixed. The inseparability of multiple features that can be accessed simultaneously, the irrelevance of geography to the use of the service, and the lack of service-related reasons to incorporate geographic or jurisdictional tracking systems into the IP network, all provide a basis for interstate treatment of IP traffic for intercarrier compensation purposes because the service provider has no means of determining which transmissions are interstate and which are intrastate. It is, therefore, becoming impossible to record and bill separately for interstate and intrastate usage, to measure revenues based upon jurisdiction, or to comply with other regulatory requirements applied based on the jurisdiction of the traffic. In such cases, it is within the Commission's authority and consistent with its precedent to preempt state regulation.

D. Network Interconnection Issues

The Commission asks questions about current network interconnection rules and changes that have been proposed by parties submitting proposals.[54] The ultimate goal is for

[52] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor A Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, at 16.

[53] *Vonage Order*, at 20 and n.106 (citing *MTS and WATS Market Structure Order* finding that "mixed use" special access lines carrying more than a de minimis amount of interstate traffic to private line systems are subject to the Commission's jurisdiction).

interconnection and intercarrier compensation to be decided by private negotiation wherever possible, facilitated by a set of default rules. Negotiation and commercial dealing will produce more efficient (and fair) arrangements than could possibly be mandated by regulation. In any case, the Commission should be sensitive to the existing configuration of networks. In this regard, the Commission needs to recognize the particular resource constraints faced by small and rural carriers.

The Commission asks specifically whether competitors ought to pay for transport outside the local calling area to the point of interconnection.[55] This situation can be problematic, particularly for smaller, rural LECs. For example, many USTA members have well-established historical incumbent local exchange carrier (ILEC) service territories with well-defined calling areas that are based on specific towns in less-densely populated areas. They typically have direct interconnection to a regional Bell Operating Company (RBOC) tandem switch, through which they are indirectly interconnected to other providers.

Some of these small, rural ILECs have experienced dramatic increases in transport costs imposed by a specific form of arbitrage in which CLECs create operations without transport networks and require the ILECs to deliver traffic to them hundreds of miles away from the ILEC local calling areas even though the CLEC is using "local" NPA-NXX codes. In these situations, the traffic flows mostly to the CLEC (and it often is bound for an ISP), so the ILEC must bear the full cost of the new indirect interconnection even though it is willing and able to enter into a direct interconnection arrangement at its local calling area (where the NPA-NXX codes would ordinarily be used).

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[54] *FNPRM* ¶¶ 93-97.

[55] *Id*. ¶ 94.

USTA set forth three concepts in its reply comments[56] to the Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs, which, taken together, help ensure that wireline carriers are justly compensated when they are required to interconnect outside their local calling areas. Although those comments were directed at wireless traffic, the concepts are applicable for other traffic as well, and USTA recommends here that the Commission adopt these concepts as default rules for all traffic. Doing so will encourage investment and facilitate the development and growth of competitive markets, thereby benefiting consumers and serving the public interest.

Specifically, USTA suggests that:

1. Where an interconnecting provider requests that an ILEC load NPA-NXX codes where the routing and rating points for the codes are not the same, the interconnecting provider must properly compensate all involved carriers for the costs incurred for transit, including transport and termination.

2. Any provider obtaining an NPA/NXX with the rate center designation (rating point) of an ILEC must designate a point of presence within the ILEC's serving area and make arrangements with the ILEC, which may include establishing a direct connection with the ILEC.

3. When the ILEC does not have a tandem, the homing arrangement for the NPA/NXX may be on the LATA tandem. This will allow calls from other areas to the NPA/NXX to be transited by the LATA tandem company and completed

[56] *See, e.g.,* Reply Comments of the United States Telecom Association, at 3-4, *Developing a Unified Intercarrier Compensation Regime; Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic By ILECs,* CC Docket No. 01-92 (Aug. 19, 2002).

by the provider. If there is no direct connection to the ILEC, the provider and the ILEC must have agreed to compensation and facilities arrangements among themselves as well as with the transiting company.[57]

Applying these concepts will not require new entrants to duplicate existing networks where it is inefficient to do so. To the contrary, requiring existing networks to provide free transport as suggested by some CLECs would encourage inefficient use of existing networks, inhibit the efficient construction of new networks, and add unnecessary and unrecoverable costs to existing carriers in an increasingly competitive environment.

E. Recovery of Lost Interstate Access Revenue

The Commission seeks comment on a number of questions regarding cost recovery related to reduced intercarrier revenue, for both price cap LECs and rate-of-return LECs, associated with the various intercarrier compensation proposals under consideration. The Commission is right to focus on and give due consideration to this matter. Recovery of lost access revenue is a critical and essential component for the success of any intercarrier compensation reform plan as well as for the continued viability of this country's network providers.

Incumbent local exchange carriers have built the telecommunications infrastructure upon which consumers across the nation have relied for over 100 years, providing them with affordable, high quality services. These networks also continue to provide an array of new services, which contribute significantly to the health and prosperity of the American economy. Because these networks are so critical for economic growth, particularly for growth that is

[57] *Id.*

dependent on broadband networks and services, it is imperative that these networks be preserved by fairly compensating the carriers that invested in deploying, operating, maintaining, and upgrading our nationwide telecommunications network.

The Commission must, therefore, consider the impact on consumers if carriers are not allowed to recover revenue that is lost through reform. At best, this lost revenue inhibits carriers' ability to upgrade and build new networks, limiting consumers' access to the network or to advanced technologies. At worst, lost access revenue prevents carriers from operating and maintaining existing networks, leaving consumers with either no service or limited service that is reduced in value because of lower quality and reliability, and that is likely to be available at very high cost. Providing carriers that lose access revenue under an intercarrier compensation reform plan with an equitable means to recover that revenue will benefit all consumers because it will allow carriers to build, maintain, upgrade, and expand the networks upon which consumers rely for all their communications needs.

Another critically important reason for incorporating a recovery mechanism for lost access revenue into an intercarrier compensation reform plan is to ensure that revenue shortfalls caused by lost access do not negatively impact universal service. If carriers are not allowed to recover revenue that is lost through reform as part of an intercarrier compensation reform plan, some carriers might have to raise rates above affordable or competitively-sustainable levels, resulting in rates in rural areas that are not reasonably comparable to rates charged for similar services in urban areas as required by Section 254. Carriers would then be in the unacceptable position of not being able to maintain, operate, and expand their networks; not being able to offer advanced services; and not being able to recover their costs, ultimately putting their viability into question to the detriment of consumers.

The Commission's efforts to reform intercarrier compensation should focus on true reform—actions that stabilize intercarrier compensation and eliminate opportunities for arbitrage, while still ensuring that network providers have sufficient revenue to continue building, operating, maintaining, and upgrading networks. The focus of intercarrier compensation reform should not be to prohibit carriers from recovering revenue lost to reform. The Commission's guiding principle when contemplating intercarrier compensation reform should be "do no harm." In other words, the Commission's reform efforts must encompass provisions that would permit local exchange carriers to recover access revenue lost in the reform process. Clearly network preservation and economic growth are compelling policy reasons for ensuring that local exchange carriers be permitted to recover access revenue that is lost as a result of intercarrier compensation reform.

In addition, the Commission would be taking on significant legal risk should it prescribe new rates and rate structures without assuring affected carriers of cost recovery, or allow this proceeding to reduce the financial value of USTA members' assets. This is true for both price cap carriers and rate-of-return carriers, even if the precise arguments may differ somewhat.

Specifically, price cap carriers need flexibility to adjust to shifting rate structures and to have the same revenue opportunities that they have today. Price cap carriers have abandoned the stability of a regulated rate of return for the benefits of greater revenue opportunities. Thus, a reform plan that does not provide for recovery of lost access revenue has the effect of an arbitrary and capricious penalty on price cap carriers that have implemented network efficiencies. Notably, price cap carriers have foregone the stability of rate of return regulation. Price cap rates, which are set with consideration given to current access revenue, are already determined to be just and reasonable. However, these just and reasonable rates become insufficient if price cap carriers are unable to recover lost access revenue, with the result being revenue losses. If the Commission does not provide price cap carriers with an opportunity to recover lost access revenue, it will have removed the very incentive that prompted carriers to move from rate of return regulation to price cap regulation in the first place.

On the other hand, rate-of-return carriers must have the choice to remain under rate-of-return regulation for all the same reasons that they were not previously required to move to incentive regulation. They should be afforded the opportunity to continue to rely on the stability of a regulated rate of return designed to meet a designated revenue requirement. However, without an access revenue recovery mechanism, the loss of access revenue would cause rate of return carriers to suffer an overall revenue shortfall below the authorized rate of return, preventing them from recovering their economic costs and placing future network investment at risk. This would also be in plain violation of applicable law governing Commission prescription of carrier rates. Remaining under rate-of-return regulation means that these carriers must be able to recover access revenue lost through the intercarrier compensation reform process in order to avoid such a revenue shortfall. Importantly, lack of an appropriate plan for recovery of lost access revenue for rate of return carriers is also likely to be challenged as a regulatory taking. In addition to revenue recovery, the Commission should continue to allow rate-of-return carriers to have the option to participate in pooling. The benefits of pooling – notably, risk and administrative services sharing and rate banding to reflect actual costs – are essential for many carriers to conduct business. Additionally, NECA subset II carriers should have the option to exit the pool pursuant to 47 C.F.R. §61.39, just as NECA subset III carriers can do today.

For all of these reasons, the Commission's reform of intercarrier compensation must include a plan for recovery of lost access revenue. Accepting that, the Commission must determine what an appropriate plan for recovery is and how such recovery will be funded and distributed.

1. Recovery Methods: Continued Intercarrier Compensation, Increased End User Charges, Universal Service Support, and an Access Restructure Mechanism.[58]

USTA supports adoption of an Access Restructure Mechanism, a concept that has been advanced in many of the intercarrier compensation reform proposals. USTA believes an ARM should be implemented in conjunction with modest and equitable adjustments in end user rates, while allowing carriers maximum flexibility in determining how to recover such increased charges from end users,[59] and with continued support from existing universal service support mechanisms, and where appropriate, with some form of continued intercarrier compensation.

The Commission should recognize that some carriers may not reasonably be expected to recover revenue lost to reform exclusively from increased end user rates. Advocates of the various plans acknowledge this. Many USTA member companies could not reasonably recover lost access revenue solely by increasing end user rates because such rates simply would not be affordable. Similarly, any SLC increases must be reasonable as many USTA members face substantial competition, which limits the extent to which they can implement SLC increases. Even USTA members facing less competition may be limited in their ability to implement SLC increases (if not reasonably capped), as rates could rise above affordable levels. Therefore, any

[58] It is unlikely that an access restructure mechanism can completely supplant the need that rural/high cost carriers have for intercarrier compensation. Any reform plan adopted by the Commission should include some continued form of intercarrier compensation for such carriers.

[59] Pricing flexibility demands a reduction in, or elimination of, economic regulation.

mandated SLC increases must be reasonable and must result in reasonably comparable rates as required by the law.

Equally important, the Commission should make clear that recovery of lost access revenue cannot come out of existing universal service mechanisms. The existing system of universal service support, which is already strained, serves the vital purpose of ensuring that consumers in rural and high cost areas have access to telecommunications and information services "that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."[60] The existing universal service system must remain focused on these efforts.

2. Funding an Access Restructure Mechanism

Any ARM adopted by the Commission should be funded broadly by all users of the public telecommunications infrastructure. Access revenues helped, and continue to assist, incumbent carriers to build, maintain, and expand the nationwide public network over which consumers and other end users have relied, and continue to rely, for consistent, reliable telecommunications services. The existence of this public network benefits all users of telecommunications services, particularly users in rural/high cost areas of the country. In these areas, rural carriers would not exist and consumers would not have service, much less access to advanced broadband services, without the access revenue that helped incumbent carriers build networks. Therefore, USTA urges the Commission to implement a broad base of contributions to fund an ARM. USTA proposes that funding for the ARM adopted as part of an intercarrier compensation reform plan should be based on connections (which may include numbers and number equivalents).

[60] 47 U.S.C. §254(b)(3).

3. Distribution of Funds from an Access Restructure Mechanism

Distributions from an ARM should only be made to carriers that have provided access services.[61] Furthermore, distributions from the ARM should not be portable. There is no need to provide portability because any carrier that is eligible for support from the ARM (*i.e.*, any carrier that has provided access services) would be able to seek additional support from the ARM based on any increase in the number of customers, whether that increase is due to totally new customers or those won over from another carrier.

There should not be any required showing to receive support from the ARM, other than the loss of revenue from action taken in this proceeding. Carriers that should recover from an ARM—those that have previously provided access services—already have demonstrated that their rates are just and reasonable, which rates take into consideration that these carriers are receiving some revenue from access charges. Therefore, it is unnecessary to require a showing of need for recovery of lost access revenue when the need for such revenue has already been considered as part of the approval process of rates that are set dependent on other revenue, particularly access revenue. Not only would a showing be unnecessary, it also would increase regulation unnecessarily, which is an added cost factor for carriers and ultimately consumers.

Equally important, it would be administratively burdensome to require a showing of financial need to receive support from the ARM, other than that the carrier will not otherwise recover its preexisting revenue requirement or comparable revenue expectation.[62] As noted previously, by finding that a carrier's rates are just and reasonable, the Commission and state commissions have already inherently determined that the additional revenue that is necessary to

[61] While competitive local exchange carriers may qualify for distributions from an ARM, wireless carriers would not.

[62] If the Commission determines that carriers seeking support from the ARM must make a showing demonstrating their need for support, any showing should be made at the federal level.

cover expenses and a reasonable return, above and beyond such rates, must come from some other source, such as intercarrier compensation revenue or an ARM. To require carriers to make a showing that they need support from an ARM, a fund that essentially replaces revenue that has already been inherently deemed necessary and appropriate by virtue of the rate setting process, is repetitive, unnecessary, burdensome, and costly. By incorporating current access revenue needs into an ARM, the Commission can clearly ascertain the necessary size of the ARM and administer contributions efficiently, without needlessly increasing administrative costs.

F. Recovery of Lost Intrastate Access Revenue

Comprehensive reform of intercarrier compensation also means that the Commission must address reform of intrastate access charges as well as interstate access charges. Recovery of lost intrastate access revenue should also be accomplished through a federal Access Restructure Mechanism. The need for such recovery is based on the fact that it is increasingly obvious that any distinctions based on jurisdiction (interstate or intrastate) are unstable and inconsistent with market operations, and that such distinctions only serve to encourage arbitrage. Again, in order to accomplish this comprehensive reform, the Commission must reform both interstate and *intrastate* access charges as well as ensure that carriers have an opportunity to recover both lost interstate and *intrastate* access revenue.

As part of any such comprehensive reform, carriers will need to be able to rebalance end-user rates through a combination of increasing rates directly and increasing federal SLCs, but without any state rate cases. Rate increases should be targeted either to composite, statewide benchmarks[63] associated with a flat SLC or to a composite, nationwide benchmark

[63] The Commission would set the various state benchmarks in keeping with its jurisdiction

associated with a variable SLC.[64] If rate increases are targeted to a nationwide benchmark, variable SLCs would be necessary to eliminate the possibility of a situation where carriers might suffer revenue loss if they are caught between a federally set nationwide target and a state that will not allow rates to be raised to the benchmark.[65]

The Commission would use the benchmarks not to alter local rates, but rather as the basis for determining the amount of lost revenue that would be recovered through the ARM. Support from the ARM would be provided only above the benchmark, whether that was a statewide or nationwide benchmark. If a carrier's local rates were not increased to the determined benchmark, it would not be able to recover the difference between its rates and the benchmark level at which point support from the ARM would be provided.

Several states have their own universal service funds, or other funds, that were implemented with the purpose of reforming and replacing some intrastate access charges. As part of the Commission's preemption over state access charges in an effort to accomplish comprehensive reform of intercarrier compensation, the Commission should provide states with the option to disband these state access replacement funds, with the support from these funds being incorporated into the federal ARM. However, every dollar that an affected carrier now

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over the ARM.

[64] A composite end user rate, whether it is a statewide or nationwide rate, would include E911 charges (federal, state, and county); subscriber line charges (federal and state); state low income program surcharges (telephone assistance programs such as state Lifeline/LinkUp services); number portability charges; USF contributions (federal and state); taxes (federal excise, state, county, other local, gross receipts, and municipal franchise fees); TRS charges (federal and state); Extended Area Service charges, including mandatory EAS, voluntary, flat rate EAS, and voluntary per minute EAS calculated by taking the average minutes of use or the average bill within the state.

[65] If variable SLCs associated with a nationwide benchmark are adopted, the Commission should allow carriers to implement higher SLC amounts over an extended transition period.

receives from a state fund should continue to be made available through that or an equivalent funding mechanism.

The Commission can address all of these reform issues associated with interstate and intrastate access charges by preempting states' authority over intrastate access charges. As discussed previously, USTA believes the Commission has the authority to preempt state regulation of intrastate access charges.

G. Key Principles To Follow when Implementing Intercarrier Compensation Reform

The Commission asks several questions in the FNPRM about implementing intercarrier compensation reform: (1) how should current regimes, some of which are based on tariffs and others of which are based on agreements, be reconciled;[66] (2) could mechanisms be adopted to provide small and rural providers the benefits of pooling in the context of agreements instead of tariffs;[67] (3) how should transition plans be structured, including any possible differences between types of providers;[68] (4) are there any adverse consequences to transitioning rate-of-return LECs more slowly than price-cap LECs;[69] and (5) should the Commission preempt any state regulations that may have the effect of prohibiting some ILECs from offering long distance services?[70]

The Commission can adopt simple default rules to facilitate negotiation and resolution. In principle, the default rules can be implemented through either tariff or model agreement. In either case, however, the Commission should ensure that the default rules minimize transaction

[66] *FNPRM* ¶ 116.

[67] *Id.*

[68] *Id.* ¶ 117.

[69] *Id.* ¶ 118.

[70] *Id.* ¶ 119.

costs, facilitate negotiation of commercial agreements, and recognize the different cost characteristics of small and mid-sized carriers. Based on our members' experience with the current tariff and interconnection agreement systems, USTA recommends that the Commission use federal tariffs as the mechanism for implementing default intercarrier compensation arrangements as this will minimize transaction costs.

It is vitally important that default intercarrier compensation arrangements be easy to administer and offer timely, inexpensive dispute resolution. Therefore, whether tariffs or agreements are used to implement default intercarrier compensation arrangements, model agreements and pooling mechanisms must be preserved. Otherwise, the transaction costs imposed by intercarrier compensation arrangements will significantly undermine the investment and efficiency benefits that the Commission is seeking from intercarrier compensation reform. Smaller companies have historically used pooling arrangements to reduce administrative costs and spread risks, for example, through the National Exchange Carrier Association (NECA). While these arrangements have typically involved tariffs, there is no reason that model agreements and pooling arrangements cannot be used to achieve the same result in a system of intercarrier compensation agreements rather than tariffs for those providers that need it.

USTA strongly urges the Commission to implement intercarrier compensation reform through transition plans that are tailored to the specific needs of different types of providers. For intercarrier reform to succeed, the transition from today's rules to the competitive markets of the future must be achievable with a minimum of implementation costs and business disruptions. This includes avoiding substantial rate shock to customers and unpredictable or steep financial impacts on providers caused by the transition itself. As different groups of providers face different implementation costs and financial impacts, the Commission must adopt transition plans that are tailored to the different circumstances of major groups of affected providers.

Finally, the Commission should take the opportunity to eliminate any residual barriers to entry in long distance markets; they are utterly inconsistent with the competitive, consumer-driven markets sought by the 1996 Act. As the Commission points out in the *FNPRM*,[71] there may still be some states that prohibit some providers (mostly, small ILECs) from providing some telecommunications services, particularly long distance service. USTA strongly opposes such restrictions, particularly now that they will restrict the Commission's ability to implement intercarrier compensation reform. Section 253(a) explicitly prohibits state rules and regulations that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

H. Transit Service

The Commission asked a number of questions about transit service in the *FNPRM*. In particular, the Commission asked: (1) whether there is a need to regulate transit service;[72] (2) what should be the scope of any such transit requirement;[73] and (3) how should the Commission determine pricing methodology, terms, and conditions of any regulated transit services?[74]

Competitive markets provide transit service. The Commission sought comment "on the extent to which providers (including non-incumbent LECs) make transit service available in the

[71] *FNPRM* ¶ 119.

[72] *Id.* ¶ 129.

[73] *Id.* ¶ 130.

[74] *Id.* ¶¶ 131-32.

marketplace at reasonable rates, terms, and conditions, and the extent to which rules implementing transit service obligations are warranted at this time." USTA members provide transit service in most of the country; they do so willingly under tariff and through commercial arrangements.[75] In addition, third-party providers of transit services have emerged in some markets.[76]

The fact that transit service is provided today on reasonable terms and conditions demonstrates that competitive markets and the threat of entry are ensuring that indirect interconnection is a viable option. Where competition does exist, there generally will be several alternative providers that can offer transit service to connect any two carriers. If a carrier with a sole direct interconnection raises price above competitive levels, there will be a strong incentive for another carrier to establish its own direct interconnection with the terminating carrier and offer transit in competition with the sole provider that raises prices on that route. In such competitive markets, there are few, if any, meaningful barriers to entry for transit service. Therefore, the Commission should expect competition to prevail in much of the country and Commission policy should emphasize the development of competitive transit service markets rather than regulation.

Narrow scope. Competition is not present everywhere, however, and some (rural) places may never be served by alternative transport networks. To the extent the Commission

[75] *E.g.*, BellSouth Communications, http://interconnection.bellsouth.com/become_a_clec/docs/ standard_ica_trro_new_clecs.pdf; BellSouth, *Telecommunications Service Provider Services*, South Carolina General Subscriber Service Tariff § A 16 (effective February 16, 2005); Michigan Bell Telephone Company, Tariff M.P.S.C. No. 20R, Part 23, Section 2 (effective July 25, 1997).

[76] *E.g.*, Neutral Tandem, (*see* Khali Henderson, *Startup Wholesales Neutral Tandem Network to Competitive Carriers*, XCHANGE, http://www.xchangemag.com/articles/4c1infra1.html (posted Dec 01, 2004).

concludes that minimal or default regulation is required to ensure that transit service is available in all areas, USTA offers some key principles from which the Commission should not deviate: (1) default rules must allow providers to recover their economic costs; (2) providers must be able to negotiate their own agreements that differ from any default rules; (3) the financial terms of default transit service arrangements should not put ILECs in the position of providing the equivalent of banking services[77] when their tandems are used for transit; and (4) state commissions should not be allowed to alter or add to these requirements. If the Commission does apply default rules to transit service, any such rules should extend to all transit service providers, including competitive LECs. If rules were to apply exclusively to incumbent LEC transit services, this would create arbitrage risks and distort competition.

TELRIC and inflexible pricing restrictions are utterly inappropriate for transit service. If the Commission does adopt rules concerning transit service, it should in all events avoid using a TELRIC pricing methodology as this will only deter investment and entry. Instead, transit service should be provided at rates that permit carriers to exercise the necessary pricing flexibility to respond to competition.

I. CMRS Issues

The Commission asks a number of questions involving the applicability and impact of intercarrier compensation reform on wireless carriers. The Commission must be very clear in any plan for reform that it adopts: wireless carriers should be subject to the same uniform intercarrier compensation regime to which all other providers of communications services are

[77] That is, tandem owners should not have to provide compensation to either party to a transiting arrangement in the event that one fails, or both of them fail, to pay the other. Nor should tandem owners be required to provide transit service in the absence of a reasonable expectation of receiving full compensation for services rendered.

subject. In today's competitive marketplace, where consumers have both intermodal and intramodal options for their communications needs, there is simply no need to single out wireless carriers for different treatment. Under a uniform intercarrier compensation regime, a call is a call, whether local or long distance, and whether made using the service of a wireline or a wireless provider. Notably, these classifications belong to the old regime, not to the future of communications. These distinctions have no place in competitive markets.

1. The IntraMTA Rule Should Be Eliminated

The IntraMTA Rule is a rule that treats wireless carriers differently than other carriers providing communications services. It has no place under a uniform system of intercarrier compensation. Therefore, the Commission should eliminate this rule, thereby incorporating wireless carriers into the reform of intercarrier compensation.

If the Commission does not eliminate the IntraMTA Rule, it will be necessary for the Commission to take appropriate steps to ensure that wireless carriers are operating in a manner that provides wireline carriers with fair compensation for the use of their networks. As USTA set forth in its reply comments on the *Sprint Petition*, the Commission could accomplish this through application of the three concepts presented above.[78]

2. There Must Be Flexibility Regarding Interconnection Agreements Between LECs and CMRS Providers

USTA applauds the Commission for recognizing that a formal negotiation and arbitration process for interconnection agreements can impose significant burdens on the interconnecting parties. USTA agrees with the Commission that one possible alternative for

[78] Reply Comments of the United States Telecom Association, at 3-4, *Developing a Unified Intercarrier Compensation Regime; Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic By ILECs,* CC Docket No. 01-92 (Aug. 19, 2002).

avoiding such burdens is to establish national terms and rates for LEC-CMRS interconnection, which may serve as the default terms and rates when carriers have made no other arrangements. However, there are other alternatives that are already available to carriers and the Commission should re-affirm their availability. Specifically, the Commission has ruled that either LECs or CMRS providers can invoke the negotiation and arbitration procedures set forth in section 252 of the Act..[79] For example, a LEC could opt into an agreement that a CMRS provider requesting interconnection has with another LEC, and vice versa. Similarly, there is no reason why carriers, particularly rural carriers, cannot band together in order to negotiate a standard interconnection agreement for use with a CMRS provider, saving all parties involved much expense and minimizing the individual time commitments of each carrier. There may be other useful alternatives. The Commission should not limit interconnecting carriers to one alternative, but should remain flexible, providing several viable alternatives.

IV. CONCLUSION

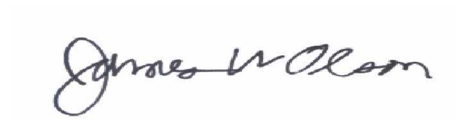
There are substantial problems with current intercarrier compensation regimes, which stem from how traffic is treated differently depending on the identities of the carriers, the jurisdiction of the call, and the underlying technology of the network on which the call originated. There is considerable agreement in the record on many of the core elements of the ultimate solution to those problems. The Commission can and should take this opportunity to transition the industry from the complicated, regulation-driven markets of today to the competitive, consumer-driven markets of the future.

[79] *See generally Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (Feb. 24, 2005).

As described above, the United States Telecom Association believes that the Commission will succeed with intercarrier compensation reform provided it upholds three fundamental principles: (1) networks are valuable and network owners must be compensated for that value; (2) universal service is a great public good that must be preserved and advanced; and (3) competition-based markets are superior to regulation and, therefore, competition should replace regulation wherever possible.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 

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